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Constitutional Law - Search and Seizure - Persons, Places and Things Protected from Search without a Warrant

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COMMENTS

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — PERSONS, PLACES AND THINGS PROTECTED FROM SEARCH WITHOUT A WARRANT

Though the people of the United States use more automobiles than the rest of the earth's population combined, the law of search and seizure[1] with respect to vehicles has been placed in the category of mooted questions by the decision of the United States Supreme Court in the case of *United States v. DiRe.*[2]

D was found seated in a parked car by an investigator from the Office of Price Administration and a detective from the Buffalo, N. Y. police force. The officers had been led to the car by information they received from R, a government informer, who told them he was going to buy counterfeit gasoline ration coupons from one B at a named place in the city of Buffalo. The first knowledge the officers had of D's presence in the car was when they found him seated beside B in the front seat of the automobile. R was in the back seat with counterfeit gasoline ration coupons in his hand. When he was asked where he got them, he pointed to B.

The officers arrested all three of the car's occupants and took them to the police station a few blocks away. At the station, D complied with a direction to put the contents of his pockets on a table. Several gasoline ration coupons which proved to be counterfeit were laid out. D was then booked and thoroughly searched. Several hundred counterfeit gasoline ration coupons were found on his person. Convicted of the misdemeanor of knowingly possessing counterfeit gasoline ration coupons, D appealed, contending his arrest had been unlawful and that the gasoline ration coupons should not have been admitted in evidence against him because they had been found

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[1] The law of search and seizure is derived from the Fourth Amendment to the United States Constitution: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

[2] 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 212 (1948).

during the course of an unreasonable search and seizure.[3]

The government argued that officers have the right to search a suspected car when they have reasonable grounds for believing it carries contraband and as an incident to such search have the right to search the occupants of such car when the contraband sought is of a nature which could be concealed on the person.[4]

The conviction was reversed in the circuit court,[5] one judge dissenting, on the ground that the arrest of D had been unlawful. On writ of certiorari, the Supreme Court, in an opinion by Justice Jackson, upheld the circuit court's decision that the arrest had been unlawful and overruled the government's contention as to the right of officers to search occupants of a suspected car. "By a parity of reasoning with that on which the government disclaims the right to search occupants of a house, we suppose the government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?" [6]

The exceptions to the general rule of searches and seizures, that no search is reasonable unless the scope of it is fixed by a disinterested magistrate,[7] are few and until recently have

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[3] The federal courts enforce the Fourth Amendment by excluding evidence obtained in violation of its provisions. Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886); Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921). Most state courts decline to follow this viewpoint, including North Dakota. State v. Pauley et al., 49 N.D. 488, 192 N.W. 91 (1923); State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925); State v. Dinger, 51 N.D. 98, 199 N.W. 196 (1924); People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926). Wigmore comments: "If there was ever any rule well settled (until the opinion in Boyd v. United States), it was this, that an illegality in the mode of obtaining evidence cannot exclude it, but must be redressed or punished or resisted by appropriate proceedings otherwise taken." WIGMORE ON EVIDENCE, 3d ed., Sec. 2264 (2).

[4] "It would seem that the Constitutional guaranties of the Fourth Amendment would apply with more force to the person than to papers, houses and effects, and so the courts have held. We apprehend that no court has ever upheld the right of an officer to search the person except as an incident to a lawful arrest." CORNELIUS, SEARCH AND SEIZURE, 2d ed., Sec. 60 (45).

[5] 159 F. 2d 818 (1948).

[6] 332 U.S. 581, 587 (1948).

[7] Agnello v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790 (1925). "The fair implication of the constitution is that no search of premises, as such, is reasonable except the cause for it be approved, the limits of it be fixed, and the scope of it particularly determined by a disinterested magistrate." Jackson, J., dissenting in Harris v. United States, 331 U.S. 145, 91 L.Ed. 1399, 67 S.Ct. 1098 (1946).

been rigidly circumscribed. There have been three major exceptions: (1) the person may be searched as an incident of a lawful arrest; [8] (2) the living quarters of an arrested person when he is arrested at home may be searched as an incident to the arrest;[9] and (3) it has been held that automobiles and other vehicles may be searched without a warrant when the officers concerned have reasonable grounds — i. e. "probable cause" [10] — for believing they carry contraband.

It is the third exception noted above which the Supreme Court has now placed in the realm of open questions. The exception itself arose from the famous case of *Carroll v. United States.*[11] In that case, the Supreme Court held valid a search in which officers stopped an automobile which they had reasonable grounds to believe carried bootleg liquor, searched the vehicle and arrested the occupants after liquor had been found hidden in the car.

The Supreme Court's decision in the *Carroll Case* turned in part upon a question of statutory interpretation. The officers in that case were engaged in enforcing the National Prohibition (Volstead) Act, which specified that officers should "seize" [12] all contraband liquor when it was discovered in a vehicle.

After citing several statutes concerned mainly with revenue and custom matters providing for searches of vehicles sus-

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[8] Note 4, *supra.*

[9] This appears to be basically an extension of the search of the person allowed during a lawful arrest. In Harris v. United States, *supra,* note 7, a case widely discussed by the legal writers, D was arrested on charges growing out of a forged check, the arrest being in his apartment. The officers spent five hours going over the entire apartment, finding at the end of that time evidence which resulted in D's conviction on a different charge than that on which he was arrested. It was held a legal search, Justices Frankfurter, Murphy and Jackson dissenting.

[10] " 'Probable cause' is synonymous with reasonable cause. It means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that grounds exist for the search, or that the person sought has committed a felony, or such a state of facts as would lead a man to believe, or to entertain a strong suspicion, that property is possessed subject to a forfeiture, or that a person has committed a felony. Probable cause does not mean prima facie evidence of guilt." United States v. Keown, 19 F. Supp. 639 (1937).

[11] 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280, 39 A.L.R. 790 (1924).

[12] "When . . . any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile or water or air craft or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." 27 U.S.C.A., Sec. 40.

pected of being used for smuggling,[13] the Supreme Court stated in the *Carroll Case*: "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure, in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant may be sought." [14]

". . . On reason and authority, the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officers, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizures are valid." [15]

In another passage, the court said: "The *intent of Congress*[16] to make a distinction between the necessity for a search warrant in the searching of a private dwelling and in that of automobiles or other road vehicles is . . . clearly established . . ."[17]

It was on this element in the *Carroll Case* — the emphasis upon the "intent of Congress" that such searches and seizures should be lawful — that Justice Jackson fastened in questioning the rule of *Carroll v. United States, supra,* in the *DiRe Case.*

Jackson posed the problem this way: "Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns

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[13] "Insofar as the stoppage of a vehicle is concerned, there is a difference in the very nature of a revenue or custom statute aimed to prevent smuggling of foreign goods into the country and a 'police' measure aimed at illegal transportation of liquor within the country. . . . But no constitutional authority can be cited for such a summary procedure when applied to motorists driving within the boundaries of the United States on a public highway." Black, *A Critique of the Carroll Case*, 29 COL. L. REV. 1068 (1929).

[14] 267 U.S. 132, 153 (1924).

[15] 267 U.S. 132, 149 (1924).

[16] Italics supplied.

[17] 267 U.S. 132, 147 (1924).

on what is 'reasonable,' the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so. The most that can be said is that some of the language by which the Court justified the search and seizure legislation in the *Carroll Case* might be used to make a distinction between what is a reasonable search as applied to an automobile and as applied to a residence of fixed premises, even in absence of legislation." [18]

While the problem thus presented by *United States v. DiRe, supra,* does not approach in importance the controversy engendered by such decisions as *Harris v. United States, supra,* (note 7), the wisdom of the *Carroll* rule has been questioned by several writers. Forrest R. Black, in *"A Critique of the Carroll Case,"* [19] stated: "The mere fact that there is a difference in the law relating to the search of a dwelling and an automobile does not of itself justify the seizure or arrest in the *Carroll* type of case. The real question is, 'What is the nature of the difference? Is the difference of such a character that it will justify a search without warrant based on probable cause?' " [20]

The objection to the *Carroll* rule noted by several legal writers is this: that the right of search thus conferred on officers of the law is broader in many cases than the right of the officers to arrest.

In the search of an automobile, the vast majority of cases involve the problem of an arrest of the car's occupant at a practically contemporaneous time. The law of search and seizure then becomes involved with the right of the officers to arrest without warrant. It is in this relationship between the law of search and the law of arrest that one of the basic problems of search and seizure with respect to automobiles emerges.

At common law the rule was that an officer might arrest without warrant where he had reasonable grounds for believing a felony had been committed. As to misdemeanors, however, the officer could arrest without warrant only for a breach of the peace committed in his presence, although there

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[18] 332 U.S. 581, 585 (1948).
[19] Note 13, *supra.*
[20] *Ibid.* at 1096.

is some authority holding he could also arrest for any misdemeanor committed in his presence.[21]

Under most state statutes, an officer has the right to arrest for a misdemeanor committed in his presence without a warrant. A few states still restrict the officer's right of arrest without warrant to misdemeanors committed in his presence which amount to a breach of the peace.[22] In the absence of applicable federal legislation, federal officers must arrest in accordance with the law of the state in which they find the person to be arrested.[23]

In New York, where the *DiRe Case* originated, officers are not allowed to arrest without a warrant on suspicion that a person has committed a misdemeanor. This is also the rule in North Dakota.[24]

It may be put as a general holding, then, that officers may not arrest without a warrant for misdemeanors not committed in their presence. This rule is generally subject to modification by statute, although on the other hand, some courts have held statutes conferring such powers upon police officers to be unconstitutional.[25]

How does this general rule of arrests apply to the rule of *Carroll v. United States?*

To illustrate, let us consider a hypothetical case. D emerges from a store carrying a parcel wrapped in heavy paper and begins to walk down the street. Across the way, two federal officers are watching him. They have probable cause for believing that D has committed the misdemeanor of, for example, purchasing unrationed butter without stamps in wartime. The package itself might in fact contain anything; the heavy wrapping prevents the officers from actually seeing what is contained in the parcel.

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[21] A.L.I. Code Crim. Procedure, tentative draft, comment, Sec. 21, p. 148.

[22] A.L.I. Code Crim. Procedure, tentative draft, Sec. 21.

[23] United States v. DiRe, *supra*.

[24] Sec. 177, N. Y. Code of Criminal Procedure; Sec. 29-0615, N.D. Rev. Code (1943).

[25] In Re Kellam, 55 Kan. 700, 41 P. 960 (1895); Pinkerton v. Verberg, 78 Mich. 573, 44 N.W. 579 (1889); Polk v. State, 142 So. 480, 167 Miss. 506 (1932); Orick v. State, 105 So. 465, 140 Miss. 184, 41 A.L.R. 1129 (1925); Ex Parte Jones, 208 S.W. 525, 84 Tex. Cr. 497 (1919); Ex Parte Rhodes, 79 So. 462, 202 Ala. 68, 1. A.L.R. 568 (1918).

Now, what are the rights of the parties in a state having normal rules of arrest? The officers cannot arrest D because he has not committed a misdemeanor in their presence.[26] But this applies only so long as D continues on foot. D now elects to drive. He comes to his parked automobile and gets in, placing the parcel on the seat beside him. The officers may now approach the vehicle, order D to get out, and search the automobile, since they have "probable cause," as already noted, for believing that the automobile contains contraband. Once the butter is found, D has been caught in the presence of the officers committing a misdemeanor. He may now be formally arrested, tried and convicted. Yet in actual fact, what has happened is that the officers have done two things the law generally condemns: they have made an exploratory search for evidence[27] and they have arrested a man on evidence obtained by making such a search.

Had the officers arrested D before the search, it now becomes clear, the arrest would have been illegal and the search invalid. *United States v. DiRe, supra.* Since the officers have been careful to search first and arrest afterward, the arrest is legal and the search is valid.

When a reason is sought for this anomaly, one is brought back inexorably to the reason advanced in the *Carroll Case,* that the search is valid and "reasonable" because of the difference between an automobile and other forms of property. It is clear, of course, that the basic pattern for the procedure of search preceding arrest was set by Section 26 of the Volstead Act,[28] which provides for the seizure of contraband liquor (necessarily preceded by a search for it) and arrest following the seizure of the liquor. And the Volstead Act, pre-

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[26] To be committing a misdemeanor in the "presence" of the officers, D would have to be carrying the illegal butter openly so that they could detect it by their senses. Thus, it is generally held that an officer has no right to arrest a person carrying a concealed weapon unless he can detect the weapon through the use of his senses. "If the weapon or evidence of crime is not visible to the officer, and he has no definite information as to whether or not such person has such weapon or such other property, or if the arrest is made upon mere conjecture on the officer's part that such person may have such a weapon, then ... the arrest and incidental search is illegal." CORNELIUS, SEARCH AND SEIZURE, Sec. 60, 45.

[27] "The famous case of Entick v. Carrington, 95 E.R. 807 (1765), is a landmark in English law. It decided two things: (1) that general search warrants were void for uncertainty; (2) that any search to obtain evidence was illegal." *Legal Search and Arrest Under the Eighteenth Amendment,* 32 Y.L.J. 490 (1923).

[28] Note 12, *supra.*

sumably with the procedure it legalized, has been defunct for many years.

It follows that the question may be stated this way: Is the mobility of the automobile a sufficient reason[29] to allow search on reasonable cause — inevitably ending in an arrest — in the case of misdemeanors? It is not suggested that where the officer has reasonable grounds for believing a felony has been committed he should be prevented from searching. Indeed, using the principle that one may search those things found in an arrested person's possession, the officer does not need to invoke the assistance of the *Carroll* rule. He may arrest upon probable cause alone and thereafter search the automobile as an incident to the arrest.[30]

But why should such a result be permitted in the case of misdemeanors? The express policy of the law has been to prohibit arrests upon mere suspicion that a misdemeanor has been committed. As already stated, more than one court has held a law conferring such powers on an officer unconstitutional.[31]

It might be noted that this view of the matter would appear to be supported by federal statute, since Congress has made unlawful search by federal officers a misdemeanor in itself, but has provided that it should not apply to one "arresting or attempting to arrest any person committing or attempting to commit an offense *in the presence* [32] of such officer, agent or employe, or who has committed, or who is suspected on reasonable grounds of having committed, a felony." [33]

Black puts the matter this way: "Are we to conclude that Congress intended the right of seizure to be broader than the right of arrest, and realizing this distinction thereby directed prohibition officers to seize first and arrest afterwards? It was on this point that there was the clearest clash between the majority and the dissent (in the *Carroll Case*) and the majority admitted that if the dissent's interpretation had been sound, its conclusion would have been sound. The fact remains that if you construe and defend the *Carroll Case* as one of

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[29] *Cf.* the dissenting opinions in Moore v. State, 138 Miss. 116, 103 So. 483 (1925); Park v. United States, 294 F. 776 (1924).

[30] This would follow under the rule of Harris v. United States, note 9, *supra*.

[31] Note 25, *supra*.

[32] See, on this proposition, note 26, *supra*.

[33] 49 Stat. 877, 18 U.S. C. Sec. 53a, 18 U.S.C.A. Sec. 53a.

search, seizure and arrest, you have gone far toward a justification of the exploratory search."[34]

It remains to consider three cases arising since the *DiRe* decision. In *United States v. One 1946 Plymouth Sedan Automobile*,[35] the Seventh Circuit Court of Appeals held valid a search of an automobile upon probable cause, specifically attempting to reaffirm the rule of the *Carroll Case*. The case arose when officers of the Alcohol Tax Unit received information that one McGee was going to make a delivery of tax unpaid alcohol in Chicago. The investigators halted the car upon the streets, and while one of them was talking to McGee, the other opened the car door, tore open the cartons in the rear seat, and found they contained cans of untaxed alcohol. McGee was then arrested and in a criminal proceeding collateral to this case was indicted apparently [36] for violation of Section 3321 (b) (1) (3) Title 26, U. S. C. A. Int. Rev. Code, a felony.

He subsequently moved to suppress evidence and his motion was granted, the government dismissing the criminal proceedings against him. Thereupon, the government instituted forfeiture proceedings against the car and it was in this civil action against McGee's automobile that the court made its holding with respect to search and seizure.

In *United States v. Nichols*,[37] D was arrested after a search of his car — again on probable cause — revealed tax unpaid alcohol. He was indicted on two counts, for violation of Section 2803, 26 U. S. C. A. Int. Rev. Code, and also for violation of Section 3321, 26 U. S. C. A. Int. Rev. Code, the same section involved in *United States v. One* 1946 *Plymouth Sedan Automobile, supra.* The indictments were for felonies. The court upheld the search and seizure of the contents of the automobile, again ostensibly on the theory of the *Carroll Case.*

In *Commonwealth v. Chaplin*,[38] a Kentucky decision, a precisely opposite result was reached. In that case, officers

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[34] *Black, A Critique of the Carroll Case*, 29 COL. L. REV. 1068, 1081, 1082 (1929).

[35] 167 F. 2d 3 (1948).

[36] The opinion in this case fails to give the precise nature of the criminal charges against McGee, but the forfeiture proceedings against the automobile were also based upon the violation of Sec. 3321 (b) (1) (3), 26 U.S.C.A., and grew out of the same set of facts.

[37] 78 F. Supp. 483 (1948).

[38] 307 Ky. 630, 211 S.W. 2d, 841 (1948).

searched an automobile on probable cause for believing that it contained liquor being transported into local option territory. This was a misdemeanor. The court put its holding on this ground: "Probable cause for seizure cannot be searched for by police officers and left for them to determine, for the Constitution provides for the intervention of judicial determination of probable cause. The protection afforded by section ten [39] of our constitution consists in requiring that probable cause for searching any place or seizing any person or thing shall be determined by a neutral judicial officer instead of by the often overzealous police or enforcement officer."

Consider first the two federal cases. In both, the arrests were for felonies. As has been pointed out, officers have the right to arrest for felonies on probable cause. It would appear then that neither of these two cases rests upon a factual situation similar to that in *Carroll v. United States, supra*, where the arrest was for a misdemeanor. The searches in the two federal cases were both incidental to arrests for felonies. If these cases are looked at from the viewpoint of the law of arrest, it would appear that they can be distinguished from *Carroll v. United States* and are not therefore solid authority.

Commonwealth v. Chaplin, supra, is thus apparently correct in its holding: since the officers had no authority to arrest D without seeing him commit a misdemeanor in their presence, it logically followed that they had no right to search D's car to obtain the evidence on which to arrest him.[40]

It is suggested that the reason behind the *Carroll* rule no longer exists. At the time of the *Carroll Case* and for several years thereafter, the federal government faced a law enforcement problem of almost insuperable proportions. The repeal of the Eighteenth Amendment, however, has substantially ended the problem which called forth the legislation authorizing such searches. The *Carroll* rule may have been eminently reason-

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[39] Substantially similar to the Fourth Amendment to the Federal Constitution.

[40] "The Supreme Court in the Gouled case (note 3, *supra*), said of the bill of rights, 'It has been repeatedly decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or gradual depreciation of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly over-zealous executive officers.' The Carroll Case violates this principle. The majority of the court . . . attempting to emphasize the distinction between the right of search and seizure of dwellings and automobiles with a warrant, has in effect denaturized the Fourth Amendment as to everything except the word 'houses.' The eloquent defense by the court of the 'right of castle' is fustian. It affords no comfort to Carroll or the motoring public." Black, *A Critique of the Carroll Case*, note 13, *supra*.

able in 1925, but is it "reasonable" in 1949?

Actually, though clearly distinguishable on their facts, the *DiRe Case* and the *Carroll Case* present practically reverse situations when reduced to their common factors. In the *Carroll Case*, the officers searched, then seized, then arrested. In the *DiRe Case*, the officers arrested, then searched, then seized. The Supreme Court unhesitatingly held the procedure illegal in the *DiRe Case*. *A fortiori* it would appear that when the officer must first search for his evidence before he can make an arrest for a misdemeanor, the arrest should be held invalid.

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